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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Policy and Rules Concerning the)	CC Docket No. 96-61
Interstate, Interexchange Marketplace)	
)	
)	
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"), by its attorneys and on behalf of its subsidiaries, Southwestern Bell Communications Services, Inc. ("SBCS"), Southwestern Bell Telephone Company ("SWBT"), and Southwestern Bell Mobile Systems ("SBMS"), files these comments in response to the Public Notice, dated January 7, 1997, establishing a comment cycle on *Petitions for Reconsideration or Clarification of the Second Report and Order* issued in the above-captioned Docket, released by the Commission on October 31, 1996 (the "*Second Report and Order*").

I. INTRODUCTION

The Commission seeks comment on several Petitions for Reconsideration or Clarification contesting the *Second Report and Order* analysis and mandate that application of forbearance standards requires the mandatory elimination of existing tariff filing requirements for non-dominant interexchange carriers ("IXCs"). Each of these Petitions contests to some extent the Commission's conclusion that forbearance from the tariff filing requirements is mandated by

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Section 10 of The Telecommunications Act of 1996 (the "Telecommunications Act").¹ As shown in these Comments, consistent regulation of all IXC's is essential to effective competition. SBC also supports, subject to the caveat that all competitors be regulated similarly, permissive detariffing.

II. DISCUSSION

A. REGARDLESS OF THE REGIME, ALL COMPARABLE CARRIERS SHOULD BE EQUALLY REGULATED

Although the Commission is correct that the entry of additional, facilities-based competition will lessen or eliminate tacit price coordination,² it is essential that the new entrant IXC's, including the Bell operating company affiliates, are regulated no differently from other IXC's. The potential differences in regulatory requirements are extremely important in a competitive market. Regulations that require one class of providers to tip their hands to competitors are a source of potentially anticompetitive activities.³

As of this date, no interstate IXC's are subject to the Commission's dominant carrier rules. Under the dormant, asymmetrical regulatory regime, however, if any carriers are made subject to the dominant carrier rules, they would not be allowed to provide the type of competition Congress and the Commission seek. The potential anticompetitive effects of requiring one carrier to file price tariffs substantially prior to their effective dates are significant. Advance notice of

¹Codified as 47 U.S.C. § 160.

²*Second Report and Order* at ¶ 23.

³*In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, Notice of Proposed Rulemaking*, ¶ 81 (released March 25, 1996).

price changes is made still more significant if only one carrier, or a few carriers, are subject to pre-effective date filing requirements.

If the rules ultimately adopted require that any class of IXC file tariffs while their competitors do not, then the Commission will have done nothing more than ensure that some carriers that hold non-dominant status, including such large, well-capitalized carriers as AT&T, MCI, and Sprint, receive the benefit of advance notice of price changes. Advance notice -- particularly asymmetrical notice -- serves no consumer or public interest. The Commission must recognize that, to ensure that consumers receive the full benefits of competition, it must implement or enforce whatever regulations it intends to continue on an even basis with respect to all carriers. To the extent that an asymmetric approach is continued and some IXCs are burdened with mandatory tariff filing requirements, while others are not, consumer and public interests are not only left unprotected, but are actively harmed.

B. PERMISSIVELY FILED TARIFFS SERVE A USEFUL PURPOSE WHERE CASUAL CUSTOMERS AND NEW CUSTOMERS OF INTERSTATE, INTEREXCHANGE SERVICES ARE CONCERNED

An evenly applied tariffing regime can provide an efficient mechanism of setting rates, terms, and conditions between interexchange carriers and their customers. As stated by Telco Communications Group, Inc.,

without a tariff, it is unclear whether customers using casual calling services have any legal obligation to pay for those services, the specific rate for the services they use, and what terms and conditions will govern the services. Such ambiguity would undermine the viability of casual calling, reduce the variety of services available to consumers and thereby hinder competition by stifling a vital portion of the industry.⁴

⁴*Telco Communications* at 2.

Further, tariffs provide a mechanism to enforce the terms and conditions of the business arrangement between interexchange carriers and new customers. As stated, there may be no effective way to enforce the actual terms of the bargain with respect to customers that have no written pre-existing contractual relationship. In the absence of a tariff that covers at least terms and conditions, there is no guarantee that an interexchange carrier could offer service on a basis that is contractually binding.⁵

Precluding interexchange carriers from the opportunity to file tariffs, especially where casual and new customers are concerned, is not in the best interest of the industry. In fact, it could preclude casual calling altogether. As AT&T agrees, interexchange carriers must be allowed to take steps necessary to ensure that the customer is legally bound by its rates, terms, and conditions of sale.⁶ It is difficult to understand how it would be contrary to the public interest to allow interexchange carriers an efficient and useful mechanism, such as permissibly filed tariffs, to communicate the terms and conditions of its service offering to its customers.

C. THE COSTS AND BURDENS ASSOCIATED WITH MANDATORY DETARIFFING FOR INTERSTATE, INTEREXCHANGE SERVICE HAVE BEEN UNDERSTATED (AND MISUNDERSTOOD) BY THE COMMISSION

The Commission has understated the costs associated with its mandatory forbearance policy for the following reasons:

- In the absence of tariffs, interexchange carriers will need to enter into discrete contractual relationships with every individual end-user customer.
- Interexchange carriers will need to notify every contract customer of rate changes or rate plan modifications.

⁵*Frontier* at 9.

⁶*AT&T* at 8.

- Interexchange carriers may effectively be required to obtain the signature of every customer each and every time a change is made to the rates, terms or conditions of the contract.⁷

The dissemination and collection of contracts signed by individual customers could be an extremely time-consuming and cumbersome process, particularly because: (1) the Commission has required that such contracts be available for public inspection and production to the Commission, (2) contracts will literally number in the millions, and (3) as set forth above, contracts will need to be disseminated and collected every time a change to the contract terms is adopted by the carrier.

The cost savings the Commission attributes to mandatory detariffing is also illusory because carriers remain obligated to prepare and retain all of the information which is now contained in the tariff filing, together with backup support, for anyone who desires to see it. The cost savings amount to little more than a savings in filing fees and postage. The "tariff" and the backup must be retained for years after the product or service has been discontinued for the use of anyone in potential compliance complaints. Carriers simply do not have to mail those items into the Commission.

Clearly, the cost savings that the Commission envisions from mandatory forbearance for domestic, interexchange service will not materialize.⁸

⁷Experience in the industry has shown that the "return rate" for contract changes requiring the customer's signature is less than 5%.

⁸Furthermore, the Commission's proposed regime could upset the current presubscription process in that, for contract law purposes, it would require carriers to obtain signed contracts--not only for new, but also for existing customers that have a contractual relationship with the carrier.

D. THE COMMISSION'S ALTERNATIVE TO TARIFFS FOR THE PROVISION OF INTERSTATE, INTEREXCHANGE SERVICES IS INSUFFICIENT

The Commission espouses the legal opinion that casual callers may be deemed to have accepted a legal obligation to pay for interexchange services rendered and that a carrier could seek recovery under an implied-in-fact contract theory. However, as Telco Communications points out, "to recover under an implied contract theory, the carrier would need to demonstrate that the elements of a contract existed, including terms that are sufficiently definite."⁹

SBC concurs with the arguments of Telco Communications. Telco Communications clearly and succinctly identifies the concerns of interexchange carriers with regard to the Commission's alternative. Specifically, Telco Communications makes the following valid points:

- an implied contract theory, as suggested by the Commission, does not guarantee that a carrier will be able to recover for calls made by a casual caller;
- tariffs are essential in many circumstances, because in casual calling arrangements, it is the tariff that supplies the terms to which a court would refer (in resolving disputes between the carrier and a customer); and
- without a tariff, there is no record of the specific rate that callers should be charged, nor is there an indication of what terms and conditions, such as applicable liability limitations, govern the call and what law carriers and callers must use to resolve any disputes.

As Telco Communications concludes, "without a tariff, the implied-in-fact contract doctrine is useless to carriers providing casual calling services, because the carriers have no documentation to illustrate to the court any definite terms from which the court could determine the customer's obligation."¹⁰ Moreover, in many instances, the cost of enforcement under a mandatorily detariffed regime would be prohibitive. Without a permissive tariff mechanism,

⁹*Telco Communications* at 2-4.

¹⁰*Telco Communications* at 4.

interexchange carriers would likely have to resort to frequent and costly litigation simply to ensure that their commercial expectations are met--costs that ultimately would be paid by the consumer.

E. **SBC AGREES WITH THOSE PARTIES WHO ARGUE PERMISSIVE
DETARIFFING SHOULD BE ALLOWED FOR THE PROVISION OF
INTERSTATE, INTEREXCHANGE SERVICE**

Interexchange carriers should be allowed, but not required, to file tariffs for calls made by casual customers and for calls made by new, presubscribing customers during the period of time preceding receipt of their initial bill (when the "contract," a statement of terms, conditions, and perhaps rates, would be delivered). As Telco Communications points out, the filed-rate doctrine does not undermine a carrier's ability to negotiate contracts for services that are not tariffed; a carrier could tariff some services, such as casual calling services, and negotiate individual contracts with customers for other services.¹¹

Additionally, as Frontier points out, the filed-rate doctrine is beneficial to customers--the ability to tariff a service, or at least the terms and conditions (if not the rates) under which a service is offered, promotes certainty in the carrier-customer relationship.¹²

Permissive detariffing would achieve the Commission's goals more effectively than mandatory forbearance and, in fact, many of the benefits identified by the Commission associated with mandatory detariffing will be realized by permissive detariffing. Such a policy would avoid the costs associated with mandatory forbearance and also would permit non-dominant interexchange carriers to tailor a regulatory regime that best meets their needs and the needs of

¹¹*Telco Communications* at 5.

¹²*Frontier* at 5.

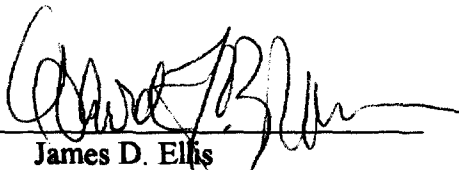
their customers.¹³

III. CONCLUSION

For the reasons stated herein, the Commission should treat all carriers equally with regard to tariff filing requirements. Further, the Commission should allow carriers to detariff interstate, interexchange services on a permissive basis when such an approach best meets the needs of the individual carrier and its customers.

Respectfully submitted,

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¹³*Id.* at 9.

CERTIFICATE OF SERVICE

I, Martha R. Kiely, hereby certify that copies of COMMENTS OF SBC COMMUNICATIONS INC., CC Docket 96-61, have been served by first class United States mail, postage prepaid, on the parties listed on the attached.


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